Alliance Bank Malaysia Bhd v Chan Teik Huat

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–899 OF 2004
ABDUL WAHAB J
14 JUNE 2006

Civil Procedure — Summary judgment — Appeal — Money lent and interest — Whether the plaintiff's imposition of interest was excessive, arbitrary and contrary to public policy — Whether the plaintiff failed to prove loss in their claim for additional or default interest being liquidated damages or penalty — Whether the plaintiff failed to provide sufficient particulars as requested by the defendant as regard's the plaintiff's claim — Contracts Act 1950 s 75

Sabah Bank Bhd had given the defendant an overdraft facility with a limit of RM16,800,000. By virtue of a vesting order, all the rights of Sabah Bank Bhd were vested in the plaintiff. Thereafter, the overdraft facility was restructured to a term loan facility of RM16,800,000. The defendant defaulted in payment. One of the properties charged to the plaintiff was sold and the proceeds utilised towards part settlement of the outstanding sum. The defendant remains indebted to the plaintiff for the amount of RM541,410.60. The plaintiff filed an application under O 14 of the Rules of the High Court 1980 against the defendant. The application was allowed by the Senior Assistant Registrar. The defendant appealed. The issues raised by the defendant were: (1) whether the plaintiff's imposition of interest was excessive, arbitrary and contrary to public policy (2) whether the plaintiff failed to prove loss in their claim for additional or default interest, being liquidated damages or penalty and (3) whether the plaintiff failed to provide sufficient particulars as requested by the defendant as regard's the plaintiff's claim.

Held:

(1) The defendant had not disputed that the plaintiff was entitled to variations in the interest rate. The defendant's only complaint was that the plaintiff's notice to vary the interest rate was never received. The notice was in fact given to the defendant via a letter dated 20 February 2001. The defendant's allegation that it had not received the plaintiff's notice was implausible as there was sufficient proof that the defendant had received the plaintiff's notice (see para 12).

(2) The defendant did not challenge the base lending rate ('BLR') and in fact accepted the plaintiff's right to vary the rate of interest. In accepting the variation in the BLR, the defendant must have equally accepted the variation of the spread which was not excessive or against public policy. The defendant was fully aware of the variation and never disputed them. He was therefore estopped from raising it now (see para 16).

(3) The plaintiff's claim for default interest was not subject to proof of its loss pursuant to s 75 of the Contracts Act 1950. This was because the facility agreement contractually allowed the plaintiff to charge interest and additional interest respectively (see para 17).

(4) The plaintiff had rendered the defendant monthly statement of accounts. The statements and the amount outstanding were computer generated and the officer producing the accounts had certified that the computer was in good order and working condition and the figures and statements produced are true and accurate, in accordance with s 90A of the Evidence Act 1950. The defendant, despite the plaintiff having Malaproduced the statement of accounts and a certificate to conclusively prove its validity was unable to produce any evidence to contradict the accuracy of the statements (see para 18).

[Bahasa Malaysia summary

Sabah Bank Berhad telah memberikan kemudahan overdraf kepada defendan dengan had sebanyak RM16,800,000. Berdasarkan kepada satu perintah letakhak, kesemua hak Sabah Bank Berhad diletakhak kepada plaintif. Selepas itu, kemudahan overdraf telah disusun semula kepada kemudahan pinjaman bersyarat berjumlah RM16,800,000. Defendan telah gagal dalam pembayaran. Salah satu daripada hartanah yang digadaikan kepada plaintif telah dijual dan hasil jualan telah digunakan sebagai sebahagian daripada penyelesaian jumlah yang tertunggak. Defendan masih terhutang dengan plaintif untuk jumlah RM541,410.60. Plaintif telah memfailkan satu permohonan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan. Permohonan telah dibenarkan oleh Penolong Kanan Pendaftar. Defendan merayu. Isu yang dibangkitkan oleh defendan adalah, (1) sama ada plaintif mengenakan kadar faedah yang berlebihan, secara sembarangan dan bertentangan dengan polisi awam (2) sama ada plaintif gagal membuktikan kerugian di dalam tuntutan mereka untuk penambahan atau faedah ingkar, sebagai ganti rugi jumlah tertentu atau penalti dan (3) sama ada plaintif gagal untuk menyediakan butiran yang mencukupi seperti mana yang dikehendaki oleh defendan berkenaan dengan tuntutan plaintif.

Diputuskan:

(1) Defendan tidak mempertikaikan bahawa plaintif berhak kepada perubahan di dalam kadar faedah. Pengaduan defendan hanyalah kepada notis plaintif untuk mengubah kadar faedah tidak diterima langsung. Notis tersebut walau bagaimanapun telah diberikan kepada defendan melalui surat bertarikh 20 Februari 2001. Dakwaan defendan bahawa notis plaintif tidak diterima adalah sukar dipercayai kerana terdapatnya bukti yang cukup bahawa defendan ada menerima notis plaintif (see para 12).

(2) Defendan tidak mencabar berkenaan dengan kadar pinjaman asas ('BLR') malahan menerima hak plaintif untuk mengubah kadar faedah. Dalam penerimaan perubahan dalam BLR, defendan mestilah bersamaan

menerima perkembangan perubahan yang mana tidak berlebihan atau berlawanan dengan polisi awam. Defendan menyedari sepenuhnya akan perubahan dan tidak mempertikaikannya. Beliau dengan ini diestop daripada membangkitkannya sekarang (see para 16).

(3) Tuntutan plaintif untuk faedah ingkar adalah tidak tertakluk kepada pembuktian ke atas kerugiannya menurut s 75 Akta Kontrak 1950. ini adalah kerana perjanjian kemudahan secara kontraknya membenarkan plaintif mengenakan faedah dan kadar tambahan setiap satunya (see para 17).

(4) Plaintif telah menyerahkan kepada defendan penyata akaun bulanan. Penyata dan jumlah tertunggak adalah janaan komputer dan pegawai yang mengeluarkan akaun telah memperakui bahawa komputer dalam berkeadaan baik dan berjalan lancar dan jumlah serta penyata yang dikeluarkan adalah benar dan tepat selaras dengan s 90A Akta Keterangan 1950. Walaupun plaintif telah dapat mengemukakan penyata akaun dan perakuan bagi mengukuhkan bukti kesahannya, defendan pula telah gagal untuk mengemukakan sebarang bukti untuk menyangkal ketepatan penyata tersebut (see para 18).]

Notes

For cases on appeal on summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index and Table of Cases (paras 6070– 6188).

Cases referred to

Alliance Bank Malaysia Bhd v CKS Trading Sdn Bhd [2002] 4 CLJ 620 (referred)
Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors [2002] 1 CLJ 391 (refd)
Credit Corp (M) Bhd v Lucky Height Development [1996] 4 MLJ 556 (refd)
Malayan Banking Bhd v Yeo Sun Tong [1996] 4 MLJ 556 (refd)
Malaysia Building Society Bhd v Univein Sdn Bhd [2002] 7 MLJ 501 (refd)
OCBC Bank (Malaysia) Bhd v GKM Amal Sdn Bhd & Anor [1999] 7 CLJ 73 (refd)
Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd [2004] 4 MLJ 327 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In Receivership) [1996] 2 MLJ 461 (refd)

Legislation referred to

Contracts Act 1950 s 75
Evidence Act 1950 s 90A

Joy Appakutan (SK Yeoh & Partners) for the plaintiff.
Rajvinder Singh (Dennis Nik & Wong) for the defendant.

Abdul Wahab J:

[1] The plaintiff filed an application under O 14 of the Rules of the High Court 1980 against the defendant. The application, which is for the amount of RM531,410.60 incurred under an overdraft facility was allowed by the senior assistant registrar on 20 October 2005.

[2] Sabah Bank Bhd had given the defendant the overdraft facility with a limit of RM16,800,000. By virtue of a vesting order dated 21 November 2000 all the rights of Sabah Bank Bhd were vested in the plaintiff. Thereafter the overdraft facility was restructured to a term loan facility of RM16,800,000. The defendant defaulted in payment. The plaintiff sent letters of demand for the amount owing. One of the properties charged to the plaintiff was sold and the proceeds utilised towards part settlement of the outstanding sum. The defendant remains indebted to the plaintiff for the amount of RM541,410.60.

[3] The issues raised by the defendant are:

(1) Firstly, whether the plaintiff's imposition of interest is excessive, arbitrary and contrary to public policy.

(2) Secondly, whether the plaintiff had failed to prove loss in their claim for additional or default interest, being liquidated damages or penalty and

(3) Thirdly, the plaintiff had failed to provide sufficient particulars as requested by the defendant as regard's the plaintiff's claim.

[4] On the first issue, the defendant submitted that whilst the plaintiff can vary the interest rate from time to time subject to written notice being given, no such notice was given to the defendant. The interest which has been varied was also said to be excessive, arbitrary and contrary to public policy. The defendant denied receiving the plaintiff's letter dated 20 February 2001 about variation in interest rate.

[5] On the second issue, the defendant submitted that default interest on late payment at the rate of 1% per annum must be proved by the plaintiff pursuant to s 75 of the Contracts Act 1950. Referring to the case of *Realvest Properties Sdn Bhd v Co-Operative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461, the plaintiff said that since the plaintiff had failed to prove its loss prior to claiming such interest, the plaintiff's claim is premature and misconceived.

[6] As for the plaintiff, on the first issue, in its submissions that due notice of the variation in the BLR has been given to the defendant as particularised in the various monthly statement of accounts sent to the defendant. The plaintiff claimed that it is entitled to vary the rate of interest and the notification of it could be sent by ordinary post.

[7] The plaintiff said that it is inconceivable that the defendant did not receive the notice since the notice was sent to the defendant's address, the same address that appears in the last letter of offer dated 22 November 1999. The statement of accounts had been sent regularly to the defendant at the same address and the defendant had admitted making payments from time to time.

[8] The plaintiff submitted that the defendant's challenge on the interest rate is unfounded since it is agreed interest that has been incorporated in the facility agreement. The notice on variation of the interest rates have been served on the defendant and the defendant did not oppose or challenge it.

[9] On the second issue, the plaintiff submitted that the facility agreement contractually allows the plaintiff to charge interest and additional interest respectively and that the plaintiff's claim for default interest of 1% is not subject to proof of loss pursuant to s 75 of the Contracts Act 1950.

[10] On the last issue, the plaintiff submitted that throughout the facility, the plaintiff had given the defendant monthly statement of accounts. Despite the production of the statement of accounts and a certificate to conclusively prove its validity, the defendant was unable to produce any evidence to contradict the accuracy of the said statements.

[11] After hearing learned counsels for the plaintiff and defendant, I decided that there are indeed no issues to be tried. The first issue raised by the defendant was not triable since the plaintiff had proven through exhs A-7, A-12 and A-13, the statement of accounts that the defendant was duly given notice of the variation in the BLR.

[12] The defendant has not disputed that the plaintiff is entitled to variations in the interest rate. The defendant's only complaint is that the plaintiff's notice to vary the interest rate was never received. The letter of offer, (exh 'A-2') provided that the variation of interest can be served on the defendant by ordinary post. The notice was in fact given to the defendant via letter dated 20 February 2001, where the defendant was informed that the rate of interest varied from 2.0% to 2.5 % above the plaintiff's BLR with effect from 1 March 2001.

[13] The defendant's allegation that it had not received the plaintiff's notice is implausible because:

(1) Firstly, the plaintiff's notice was sent to the defendant's office address that house several of the defendant's companies, namely Newacres Sdn Bhd, Metroplex Berhad and their related companies.

(2) Secondly, this is the same address that appears in the last letter of offer dated 22 November 1999 that the defendant had truly accepted.

(3) Thirdly, the plaintiff's notice was duly sent to the address as stated in the letter of offer and was not returned. This in itself is sufficient proof that the defendant had received the plaintiff's notice.

(4) Fourthly, the address as stated in the plaintiff's notice is the same address which the defendant used to correspond with the plaintiff.

(5) Fifthly, the statement of accounts had been regularly sent to the defendant at the same address and the defendant admitted making payment on the account from time to time. Surely when making payment, the defendant would have known of the variation in the rate of interest, yet chose not to raise any dispute.

[14] I refer to *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501, where it was held that the defendant's contention that the plaintiff's claim for interest is excessive and against the public interest has no merit since the said interest has been agreed to by the defendant. The interest rate has been incorporated in all charges and

no such complaint was raised by the defendant at the inception, approval, disbursement of the loans and when making payments on the account from time to time.

[15] The case of *OCBC Bank (Malaysia) Bhd v GKM Amal Sdn Bhd & Anor* [1999] 7 CLJ 73 cited by the defendant is distinguishable. In that case, the BLR was increased from 9.30% to 12.25 %, an increase of 3% within a span of about 12 months. Further in that case the increase in interest rate was done unilaterally. These observations were also made in *Pengurusan Danaharta National Bhd v Miri Salamjaya Sdn Bhd* [2004] 4 MLJ 327 when the court distinguished *OCBC v GKM Amal* as the increase in interest rate was unilaterally done.

[16] Unlike in the case of *OCBC Bank (Malaysia) Bhd v GKM Amal Sdn Bhd*, the defendant in our case does not challenge the BLR and in fact accepts the plaintiff's right to vary the rate of interest. Surely, in accepting the variation in the BLR, the defendant must have equally accepted the variation of the spread which I find as not excessive or against public policy. The defendant was fully aware of the variation and never disputed them. He is therefore estopped from raising it now.

[17] As for the second issue, I am of the opinion that the plaintiff's claim for default interest of 1% is not subject to proof of its loss pursuant to s 75 of the Contracts Act 1950. This is because the facility agreement contractually allows the plaintiff to charge interest and additional interest respectively. This was decided in a number of decisions like *Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 which supports the view that s 75 Contracts Acts 1950 was not applicable as the increase in the rates of interest was contractually provided for. Again, the default interest rate of 1% is not excessive as it would meet the requirement of genuine pre estimate contractually agreed by the parties. In the case of *Alliance Bank Malaysia Bhd v CKS Trading Sdn Bhd* [2002] 4 CLJ 620, the court allowed the imposition of interest on the outstanding sum since it was specifically provided under the clause of the memorandum of charge. In determining whether or not default interest is a penalty, I look to the Federal Court case of *Realvest Properties Sdn Bhd v Co-operative Central bank Ltd (In Receivership)* [1996] 2 MLJ 461 where it was held that: 'Default interest may or may not be a penalty, depending on circumstances. Illustration (d) of s 75 of the Contracts Act 1950 gives rise to a dear implication that default interest rate must be exorbitant in order that it be caught by s 75.' I am satisfied that the default interest rate is far from being exorbitant and is not subject to proof as alleged.

[18] On the third issue, I find for a fact that the plaintiff has rendered the defendant monthly statement of accounts. The statements and the amount outstanding are computer generated and the officer producing the accounts have certified that the computer is in good order and working condition and the figures and statements produced are true and accurate, in accordance with s 90A of the Evidence Act 1950. The defendant, despite the plaintiff having produced the statement of accounts and a certificate to conclusively prove its validity is unable to produce any evidence to contradict the accuracy of the statements. The case of *Malayan Banking Bhd v Yeo Sun Tong* [1996] 4 MLJ 556 does not help the defendant.

In that case, the plaintiff failed to plead the claim for interest that gave rise to a lack of precision in the amount claimed. This is because the sum claimed in the demand and statement of claim differs. Further the third defendant in that case made a proper request for particulars. In that case the notice of variation of the rates must be given and there was no evidence tendered before the court that such notice was in fact given. Further, the case of *Credit Corp (M) Bhd v Lucky Height Development* [1996] 4 MLJ 556 does not support the defendant's contention. There the loan agreement provides that the notice of variation of the interest rate must be given. No evidence was produced to show that the notice of variation of the interest rate was given to the Borrower.

[19] In our case, prior notice has been given to the defendant before a variation of the interest rate can be effected. Further, regular monthly statements of account (that contain the variation of the base lending rate) has been rendered to the defendant.

[20] There being no issues to be tried, I dismissed the defendant's appeal with costs.

Defendant's appeal dismissed with costs.

Reported by Peter Ling